A

SITI HASNAH VANGARAMA ABDULLAH

v.

TUN DR MAHATHIR MOHAMAD (AS THE PRESIDENT OF PERKIM) & ORS

B

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
SULAIMAN DAUD JCA
HISHAMUDIN MOHD YUNUS JCA
C [CIVIL APPEAL NO: P-01(IM)-606-2010]
30 JULY 2012
[2012] CLJ JT(4)

D ***CONFLICT OF LAWS:*** *Jurisdiction - High Court of Malaya - Syariah High Court - Conversion of minor of Hindu faith to Islam - Subsequent application to renounce Islamic faith - Whether matter within exclusive jurisdiction of Syariah High Court - Whether action seeking to challenge legality and constitutionality of conversion - Whether within exclusive jurisdiction of civil High Court - Federal Constitution arts. 11(1), 12(4), 121(1A) - Administration of Islamic Religion (State of*
E *Penang) Enactment 2004, ss. 61(3)(b)(x), 117 - Rules of the High Court 1980, O. 18 r. 19(a)-(d)*

F ***CONSTITUTIONAL LAW:*** *Courts - Jurisdiction - Syariah and civil courts - Conversion of minor of Hindu faith to Islam - Subsequent application to renounce Islamic faith - Whether matter within exclusive jurisdiction of Syariah High Court - Whether action seeking to challenge legality and constitutionality of conversion - Whether within exclusive jurisdiction of civil High Court - Federal Constitution, arts. 11(1), 12(4), 121(1A)*

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ISLAMIC LAW: *Jurisdiction - Syariah High Court - Conversion of minor of Hindu faith to Islam - Conversion effected without parental consent - Subsequent application to renounce Islamic faith - Whether action seeking to challenge legality and constitutionality of conversion - Whether*
H *not a matter within exclusive jurisdiction of Syariah Courts - Administration of Islamic Religion (State of Penang) Enactment 2004, ss. 61(3)(b)(x), 117*

I

This was an appeal against the decision of the High Court striking out the appellant's originating summons ('OS') for declaratory relief under O. 18 r. 19 Rules of the High Court 1980 ('RHC') on the ground that the suit came within the exclusive jurisdiction of the Syariah High Court, and therefore triable by that court. The appellant, a Hindu by birth, had purportedly converted to Islam in 1989 when she was seven years old, when the second respondent, then an official of the Muslim Welfare Society Malaysia ('PERKIM'), together with officials of the third respondent Majlis Agama Islam Negeri Pulau Pinang, brought her before a Kadi in Penang and had her renounce her Hindu faith and embrace Islam. It was not disputed that the appellant's conversion was effected without the consent of her parents, notwithstanding that the latter had themselves converted to Islam from Hinduism some six years earlier. It was the learned High Court judge's view, in declining jurisdiction, that the subject-matter of the appellant's action was essentially an action to renounce her Islamic faith, such that her application came squarely within the provisions of s. 61(3)(b)(x) of the Administration of Islamic Religion (State of Penang) Enactment 2004 ('the Enactment') – and the jurisdiction of the Penang Syariah High Court. Before the learned justices of appeal herein, the appellant argued that her OS ought to be heard by a civil High Court, as she was never a Muslim in the first place. It was the appellant's further contention that she had been made to renounce her Hindu faith and embrace Islam in an unconstitutional and unlawful manner, and that the conversion, done without her parental consent and at a time when she did not understand what the process of conversion was all about, violated s. 117 of the Enactment and arts. 11(1) and 12(4) of the Federal Constitution. The respondents regurgitated that the appellant was already a Muslim at the time of her conversion in 1989 as her father upon his conversion to Islam in 1983 had signed an affirmation stating that he had embraced Islam together with his five children. They maintained that the High Court was right in declining jurisdiction and treating the subject-matter of the appellant's complaint as concerning Islamic law.

A B C D E F G H I

Held (allowing appeal; ordering OS to be tried before civil High Court)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) A civil High Court must be extremely cautious and slow in declining jurisdiction and in coming to the conclusion that the subject-matter of an action before it falls within the exclusive jurisdiction of the Syariah Courts, particularly so in cases involving the fundamental rights of the subjects. (para 34)

(2) The legal burden here is on the respondents to satisfy the court that the subject-matter of the action is such that it comes exclusively within the jurisdiction of the Syariah High Court of Penang. On the facts, the respondents have not discharged this burden. (paras 12 & 13)

(3) It is not the law that a subject-matter of a claim or complaint automatically ceases to be within the jurisdiction of the civil courts just because it has an Islamic law element in it. This is not the intention of art. 121(1A) of the Federal Constitution. The correct position in law is that, only if the subject-matter of the action is exclusively within the jurisdiction of the Syariah Courts would the subject-matter, by virtue of art. 121(1A), fall outside the jurisdiction of the civil courts. (paras 14 & 15)

(4) For the Syariah High Court of Penang to have jurisdiction by virtue of s. 61(3)(b)(x) of the Enactment, two prerequisites must be satisfied, namely, that all parties to the action are Muslims and the declaration sought by the claimant must be that he is **no longer** a Muslim. However, from the nature of the declaration sought, and the averments in her supporting affidavit, the appellant is clearly not claiming to be a Muslim, and neither is she renouncing the Islamic faith. This is not a case of the appellant claiming being a Muslim and now wanting to renounce her Islamic faith. What the appellant is contending is that she **never** was a Muslim in the first place. She was a Hindu by birth but had been made, in an unconstitutional and unlawful manner, to renounce her Hindu faith and to embrace Islam by the wrongful actions of the respondents. (paras 18 & 23)

(5) Although the striking out applications are not purely based on limb (a) of O. 18 r. 19(1) of the RHC, and hence reliance on the supporting affidavits by the respondents are permissible, nevertheless, in determining whether or not the subject-matter of the action comes within the exclusive jurisdiction of the Syariah High Court, the court hearing the striking out applications must give due consideration to the nature of the relief sought and the content of the appellant's supporting affidavits for the originating summons. The court must not at this stage embark on an in-depth evaluation of the conflicting affidavits of both sides and then endeavour to make findings of facts or of mixed law and facts, and thereafter make a determination as to whether or not the subject-matters falls within the exclusive jurisdiction of the Syariah High Court, as what the learned High Court judge had done in the present case. Besides muddling the issue, that would not be the correct approach. (para 26)

(6) The correct approach is for the court to examine the exact nature of the relief sought and the supporting affidavit of the appellant's OS and ask itself: assuming the facts alleged therein are true, and considering the exact nature of the relief sought, would not the matter fall exclusively within the jurisdiction of the Syariah High Court? If the answer is "Yes", then and only then the matter falls outside the jurisdiction of the civil courts. However, if the answer is in the negative, the court must dismiss the striking out applications. (para 26)

(7) Assuming that the facts as averred in the appellant's supporting affidavit for the OS herein were true, it is clear that the "conversion" of the plaintiff in 1989, done while she was a minor, born of Hindu parents, of the Hindu faith, without her parents' consent, and without her understanding what the conversion process was all about, would be violations of her as well as her parents' constitutional rights enshrined in arts. 11(1) and 12(4) of the Federal Constitutions. It is clearly within the jurisdiction of the civil High Court to determine as to whether or not there have been infringements of arts. 11(1) and 12(4) by the officials of PERKIM and the Penang Islamic Religious Authority.

Moreover, arts. 11(1) and 12(4) relate to fundamental liberties and enforcement of fundamental liberties under the Federal Constitution is a matter vested solely within the jurisdiction of the civil High Courts. (paras 27-29)

(8) The allegation that the appellant was a Muslim since 1983 when her parents had embraced Islam only constituted the respondents' position. That position was disputed by the appellant who questioned why, if indeed she was already a Muslim, there was a need for her in the affirmation in 1989 to renounce her Hindu faith and to embrace Islam. In any case, these are contentious matters that should not be dealt with too deeply by the court at the striking out applications stage. These are matters that must be determined at the trial proper.

[Matter ordered to proceed to trial before High Court with advice that OS be converted to writ action.]

Case(s) referred to:

Abd Malek Hussin v. Borhan Hj Daud & Ors [2008] 1 CLJ 264 HC ***(refd)***

Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No 3) [2001] 2 CLJ 709 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Dato' Kadar Shah Tun Sulaiman v. Datin Fauziah Haron [2008] 4 CLJ 504 HC ***(refd)***

Kamariah Ali & Satu Lagi lwn. Majlis Agama Islam dan Adat Melayu Terengganu & Yang Lain [2006] 2 CLJ 168 HC ***(refd)***

Lim Yoke Khoon lwn. Pendaftar Muallaf, Majlis Agama Islam Selangor & Yang Lain [2006] 4 CLJ 513 HC ***(refd)***

Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 3 CLJ 557 FC ***(refd)***

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 2 CLJ 5 FC ***(refd)***

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***

Legislation referred to:

Administration of the Religion of Islam (State of Penang) Enactment 2004, ss. 61(3)(b)(x), 117

Courts of Judicature Act 1964, s. 25(2)

Federal Constitution, arts. 11(1), 12(4), 121(1A)

Guardianship of Infants Act 1961, s. 5(1)

Rules of the High Court 1980, O. 18 r. 19(1)

For the appellant - Gooi Hsiao Leung; M/s Gooi & Assocs
For the first respondent - Mathias Chang; M/s Suhaimi Khor Zulkifli & Chang
For the second respondent - Tuan Zubaidah Tuan Muda (Zati Farahiyah Halim with her); M/s Nik Saghir & Ismail
For the third & fourth respondents - Hairuddin Othman (Noor Asyimah Ramli with him); M/s Noor Asyimah & Assocs

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-2014-2009]

Reported by Wan Sharif Ahmad

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal against the decision of the High Court of Penang which had allowed the respondents' applications (all the four respondents filed separate applications) pursuant to O. 18 r. 19(1) (limbs (a) to (d)) of the Rules of the High Court 1980 to strike out the appellant's originating summons action.

[2] The appellant (the plaintiff before the High Court; and, hence, after this shall be referred to in this judgment as 'the plaintiff') in her originating summons action before the High Court had sought a declaration that the respondents (the defendants before the High Court: and shall hereinafter be referred to as 'the defendants') in 1989 had unlawfully caused her to undergo a process of conversion to Islam when the plaintiff was seven years of age.

[3] It is undisputed that when the plaintiff was born (in 1982), her parents were of the Hindu faith. Her parents gave her the name Banggarma a/p Subramaniam. On 28 December 1989 the plaintiff was taken by the second defendant together with officials of the third defendant (Majlis Agama Islam Pulau Pinang) before a kadi in Penang. She was then only seven years old. Before the kadi she was instructed to take an affirmation of faith to renounce her Hindu faith and embrace Islam; and, thereafter, she was made to sign a Certificate of Affirmation of Faith (Sijil Akuan Masuk Islam).

[4] There is a society called the Muslim Welfare Society Malaysia (Pertubuhan Kebajikan Islam Malaysia). It is also known by the acronym PERKIM. The second defendant, Hj Raimi, was at the material time an official of PERKIM. At the material time the first defendant, Tun Dr Mahathir was the president of PERKIM.

[5] The detail facts that she alleges in her supporting affidavit are as follows:

Affidavit In Support

Siti Hasmah Vangarama Binti Abdullah (Nric No. 820813-06-5578) of full age and a Malaysian citizen, residing at No. 50, Jalan Besar, 34250 Tanjung Piandang, Perak, do hereby affirm and say as follows:

(1) I am the above named plaintiff and the facts deposed herein are true to the best of my personal knowledge and from the records in my possession unless stated otherwise.

(2) I am 26 years of age and I was born on the 13th day of August, 1982. A copy of my NRIC Card is now produced and shown to me marked as exhibit "BAS-1".

(3) I am an Indian by race, and a Hindu by birth. I say that the original Hindu birth name given to me by my parents is Banggarma a/p Subramaniam.

(4) A copy of my birth certificate is now produced and shown to me marked as exhibit "BAS-2".

(5) I say that when I was seven years of age, on the 28th day of December 1989, I was taken by the second defendant, Tuan Haji Raimi bin Abdullah, an official of first defendant's society, PERKIM, and other muballigh officials from the third defendant to the kadi Bandaraya of Penang to be converted into a Muslim.

(6) I say that at the material time, in presence of the aforesaid Tuan Haji Raimi bin Abdullah and other Penang Islamic Council Muballigh officers, I was instructed by the kadi bandaraya to take the affirmation of faith "Kalimah Shahadat", by uttering and reciting the following words:

(a) That I, Bangarama a/p Subramaniam, Nric No. C179583, born on 13 August 1982 and staying in Kepala Batas, SPU, the owner of the above picture, on this day, joyously before you, informs you that I now verily have faith that the religion of Islam is the best religion. Therefore, I hereby joyously say that from this moment I have renounced the Hindu religion which I have embraced before and on my own free will I have chosen the sacred holy Islam religion as my religion.

(b) Now to confirm that I have become a Muslim without being forced by anyone I hereby affirm by uttering two Kalimah Shahadat: Verily, I bear witness that there is no god but Allah and I bear witness that the Prophet Muhammad S.A.W. is the messenger of Allah.

(c) I hereby admit that everything I have said above is all true and I have chosen a Muslim name.

(7) I say that immediately upon taking the aforesaid oath of affirmation of faith on the 28th day of December 1989, I was asked by the kadi Bandaraya to execute the Certificate of the Declaration to Convert into Islam "Sijil Akuan Masuk Islam". A copy of the aforesaid Certificate of Declaration to Convert into Islam dated the 28th day of December 1989 is now produced and shown to me marked as exhibit "BAS-3".

(8) I say that at the material time, I did not and could not have understood the contents and meaning of the words in the said Certificate of Declaration to Convert into Islam dated 28th day of December 1989 of which I was asked to recite, utter and execute.

(9) I further say and stress that as a child, merely seven years of age, I did not have any choice except to obey the directions given by the defendants to take the affirmation of oath.

(10) I say that up until recently, I was ignorant of that fact that my purported conversion process into Islam by the defendants when I was seven years old was defective and bad in law, and that I could legally challenge the same until after having consulted and being advised by my present solicitor.

A (11) I am advised by my solicitor and verily believe that the first defendant's society, PERKIM, the second defendant, the third defendant and fourth defendant had, jointly and severally, acted wrongfully and unlawfully by instructing me to recite the Kalimah Shahadat and to give my consent to convert into Islam on 28.12.1989 when I was seven years old.

(12) Based on the aforesaid, I pray for an order in terms of my Originating Summons filed together herein, ...

C **[6]** The defendants did not file any affidavit to oppose the originating summons. Whatever affidavits filed by the defendants are only for the purpose of their striking out applications.

[7] The common ground for the striking out applications is that the High Court of Malaya at Penang had no jurisdiction to D adjudicate on the subject-matter of the action in the originating summons. It is contended by the defendants that only the Syariah High Court of Penang would have the exclusive jurisdiction to adjudicate on the action – as the subject-matter of the complaint concerned Islamic law.

E **[8]** The High Court of Penang had allowed the defendants' striking out applications with costs, accepting the contention of the defendants. According to the learned High Court judge in his grounds of judgment:

F [57] Di atas huraian yang telah mahkamah butirkan di atas, mahkamah ini berpendapat dari keterangan-keterangan yang terdapat, plaintif adalah seorang yang beragama Islam sejak kedua ibu bapa plaintif menganut agama Islam bersama-sama adik beradik plaintif serta plaintif sendiri dan plaintif masih kekal dalam G agama Islam pada 28.12.1989 ketika pengeluaran Sijil Akuan Masuk Islam oleh defendan keempat dalam upacara yang dijalankan oleh PERKIM yang defendan Pertama adalah Yang Di Pertua PERKIM pada ketika itu dan defendan Kedua adalah Setiausaha PERKIM ketika itu.

H [58] Di atas alasan-alasan oleh mahkamah ini yang disebutkan di atas, mahkamah berpendapat tindakan yang dibawa oleh plaintif bagi mendapatkan deklarasi yang dipohonkan adalah merupakan perkara pokok (subject-matter) yang eksklusif berada di bawah bidangkuasa I Mahkamah Syariah untuk memutuskannya dan I bukannya di mahkamah ini. Di atas alasan ini sahajapun tindakan

plaintif ini wajar ditolak di atas alasan mahkamah ini tidak mempunyai bidangkuasa bagi mendengar dan memberikan perintah yang dipohonkan oleh plaintif tersebut bahawa dia bukan seorang yang beragama Islam.

[9] At the commencement of the hearing of this appeal, parties agree that this court should decide only on one issue: whether or not the subject-matter of the plaintiff's action falls within the exclusive jurisdiction of the Penang Syariah High Court.

[10] Hence, in this judgment, we shall only confine ourselves to this single issue.

[11] With respect we are unable to agree with the decision of the learned judge. We are unable to agree with the view that he expressed that the subject-matter of the action is exclusively within the jurisdiction of the Syariah High Court of Penang.

[12] In our judgment, in the present case, since it is the defendants who are making the striking out applications, the legal burden is on the defendants to satisfy the court that the subject-matter of the action is such that it comes exclusively within the jurisdiction of the Syariah High Court of Penang.

[13] In our judgment, we do not think that the defendants have discharged that legal burden.

[14] At the outset we wish to stress here that we do not think that it is the law that a subject-matter of a claim or complaint automatically ceases to be within the jurisdiction of the civil courts just because it has an Islamic law element in it. This is not the intention of art. 121(1A) of the Federal Constitution says. Clause (1A) of art. 121 states:

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

[15] In our view, the correct position in law is that only if the subject-matter of the action is exclusively within the jurisdiction of the Syariah Courts would the subject-matter, by virtue of art. 121(1A) of the Federal Constitution, fall outside the jurisdiction of the civil courts.

[16] Therefore, the pertinent question that needs to be asked is: is the subject matter of the originating summons action exclusively within the jurisdiction of the Penang Syariah High Court?

[17] Now, in contending that the subject-matter of the action falls within the exclusive jurisdiction of the Syariah High Court of Penang, the defendants refer to s. 61(3)(b)(x) of the Administration of Islamic Religion (Penang) Enactment 2004 that provides:

> **61. Jurisdiction of the Syariah High Court.**
>
> (3) The Syariah High Court shall -
>
> (a) ...
>
> (b) in its civil jurisdiction hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the actions or proceedings relate to -
>
> (i) ...
>
> ...
>
> (x) a declaration that a person is no longer a Muslim;

[18] It is to be observed that for the Syariah High Court of Penang to have jurisdiction by reason of the above limb (x) of para. (b) of sub-s. (3) of s. 61 of the Enactment, we have to be satisfied that (1) all parties to the action are Muslims and (2) the declaration sought by the claimant/complainant in the action has to be that he is no longer a Muslim.

[19] Now, it is the contention of the defendants that the nature of the subject-matter of the complaint falls exclusively within the jurisdiction of the Syariah High Court of Penang as the plaintiff is a Muslim and is seeking to renounce her Islamic faith.

[20] Is this a correct statement of the plaintiff's case? With respect, we do not think so.

[21] We have examined the first prayer of the originating summons. It says:

> (1) Untuk suatu Deklarasi bahawa Defendan-Defendan secara salah dan tidak mengikuti undang-undang telah menyebabkan Plaintif menjalankan suatu proses kemasukan agama pada usia tujuh tahun pada 28.12.1989.

[22] We have also examined the plaintiff's supporting affidavit (as set out above). A

[23] In our judgment, from the nature of the declaration sought, and the averments in her supporting affidavit, clearly, the plaintiff is not claiming to be a Muslim; neither is she renouncing the Islamic faith. It is not a case of the plaintiff claiming being a Muslim and now wanting to renounce her Islamic faith. On the contrary, what the plaintiff is contending is that she was never a Muslim in the first place. She was a Hindu by birth but had been made, in an unconstitutional and unlawful manner, to renounce her Hindu faith and to embrace Islam on 28 December 1989 by the wrongful actions of the defendants. It is her contention that the 'conversion' was unlawful and unconstitutional, and, therefore, invalid; as she was at that point of time a Hindu, a minor, and there was no parental consent for the conversion; and being of seven years of age she did not understand what the conversion process was all about. It is her contention that the alleged conversion to Islam was contrary to s. 117 of the Administration of the Religion of Islam (State of Penang) Enactment 2004; contrary to s. 5(1) of the Guardianship of Infants Act 1961; and there have been violations of her constitutional rights under art. 11(1) and art. 12(4) of the Federal Constitution. Section 117 of the Administration of the Religion of Islam (State of Penang) Enactment 2004 provides: B C D E

Capacity to convert to the religion of Islam. F

117. For the purpose of this Part, a person who is not a Muslim may convert to the religion of Islam if he is of sound mind and:

(a) has attained the age of eighteen years; or

(b) if he has not attained the age of eighteen years, his parent or guardian consents to his conversion. G

[24] Section 5(1) of the Guardianship of Infants Act 1961 provides:

5. Equality of parental rights. H

(1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal. I

A **[25]** She contends that by the defendants asking her to recite the following words in para. (a) during the 'conversion' process:

> Therefore, I hereby joyously say that from this moment I have renounced the Hindu religion which I have embraced before and on my own free will I have chosen the sacred holy Islam religion as my religion.

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this, by itself, is an acknowledgment on the part of the defendants that, at the time of the alleged conversion to Islam, she was a Hindu.

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[26] In our judgment, although we are conscious of the fact that the striking out applications are not based purely on limb (a) of O. 18 r. 19(1), and hence reliance on the supporting affidavits by the defendants are permissible, nevertheless we take the view that, in determining as to whether or not the subject-matter of the action comes within the exclusive jurisdiction of the Syariah High Court, the court hearing the striking out applications must give due consideration to the nature of the relief sought and the content of the plaintiff's supporting affidavit for her originating summons. The court must not at this stage embark on an in-depth evaluation of the conflicting affidavits of both sides and then endeavour to make findings of facts or of mixed law and facts, and thereafter to make a determination as to whether or not the subject-matter falls within the exclusive jurisdiction of the Syariah High Court, as what the learned High Court judge (with respect) had done in the present case. That, in our view, with respect, besides muddling the issue, would not be the correct approach. The court must not forget that at this moment it is only hearing striking out applications. It is not yet hearing the main action. The correct approach is for the court to examine the exact nature of the relief sought and the supporting affidavit of the plaintiff's originating summons and ask itself: assuming the facts alleged in the supporting affidavit are true, and considering the exact nature of the relief sought, would not the matter fall exclusively within the jurisdiction of the Syariah High Court? If the answer is 'Yes', then (and only then) the matter falls outside the jurisdiction of the civil courts. However, if the answer is in the negative, then the court must dismiss the striking out applications.

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[27] Now, back to the alleged facts of the present case, assuming for the moment that the facts as averred in the supporting affidavit (for the originating summons) of the plaintiff in her originating summons are true, it follows then that the 'conversion' of the plaintiff in 1989, done while she was a minor, born of Hindu parents, of the Hindu faith, without her parents' consent, and without her understanding what the conversion process was all about, would be violations of her constitutional rights (as well as the constitutional rights of her parents). For art. 11(1) of the Federal Constitution provides:

> **11. Freedom of religion.**
>
> (1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

[28] And art. 12(4) of the Federal Constitution provides:

> (4) For the purpose of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

[29] These alleged violations of constitutional rights call for constitutional interpretation of the Federal Constitution and an examination into the evidence and the facts. It is clearly within the jurisdiction of the civil High Court to determine as to whether or not there have been infringements of art. 11(1) and art. 12(4) of the Federal Constitution by the officials of PERKIM and the Penang Islamic religious authority. Moreover, arts. 11 and 12 relate to fundamental liberties under the Federal Constitution. Enforcement of fundamental liberties under the Federal Constitution is a matter vested solely within the jurisdiction of the civil High Courts (see s. 25(2) of the Courts of Judicature Act 1964 read with para. 1 (prerogative writs) of the schedule to the Act). These are not matters within the exclusive jurisdiction of the Penang Syariah High Court. Indeed, the determination and the enforcement of fundamental rights under the Federal Constitution are matters that are outside the jurisdiction of Syariah courts.

[30] The respondents/defendants in this appeal, in support of their contention that the subject-matter of the plaintiff's action falls within the exclusive jurisdiction of the Syariah High Court of Penang, cite the following cases:

A (a) *Kamariah Ali & Satu Lagi lwn. Majlis Agama Islam dan Adat Melayu Terengganu & Yang Lain* [2006] 2 CLJ 168;

(b) *Lim Yoke Khoon lwn. Pendaftar Muallaf, Majlis Agama Islam Selangor & Yang Lain* [2006] 4 CLJ 513;

B (c) *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor* [1999] 2 CLJ 5; and

(d) *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557.

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[31] With respect, in our view, none of the above cases support the position taken by the defendants.

[32] However, we would like to add that we are mindful of the supporting affidavits of the defendants filed for the purpose of their striking out applications; and, in particular, the defendants' allegation in the affidavits that the plaintiff's Hindu parents converted to Islam way back in 1983 at the Islamic Religious Department, Pahang, when the plaintiff was still an infant of one year and three months; and that at the time of the conversion her father had signed an affirmation (surat akuan) dated 30 November 1983 stating that he embraced Islam together with his five children (her mother also made a similar affirmation on the same date but in her affirmation she made no mention of the five children). It is, therefore, the contention of the defendants that the plaintiff was already a Muslim since 1983; and, hence, the plaintiff's action is in essence an action to renounce the Islamic faith. However, this is merely the defendants' position and clearly the plaintiff in her reply affidavits disputes these facts and the assertion, and is questioning as to why there is the need in the affirmation (in the 1989 'conversion' procedure) to renounce her Hindu faith and to embrace Islam if the defendants are taking the position that she was already a Muslim since 1983. In our judgment, these are contentious matters that should not be dealt with too deeply into at this stage, when we are only hearing striking out applications. These are matters to be determined at the trial and not during the striking out applications (and this means that the originating summons ought to be converted to a writ action).

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[33] Lest that we be misunderstood, we wish to make it clear here that we are not taking the position that the court may not take into account the defendants' supporting affidavits. As we have said earlier the applications are not solely based on limb (a) of O. 18 r. 19(1) of the RHC where any reference to supporting affidavits is not permissible. But the pertinent question is: have the defendants by their supporting affidavits able to establish that the plaintiff's assertion that the civil High Court has the jurisdiction to hear her action is, on the face of it, obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7). We do not think so.

[34] In conclusion, we wish to say that a civil High Court must be extremely cautious and slow in declining jurisdiction and in coming to the conclusion that the subject-matter of an action before it falls within the exclusive jurisdiction of the Syariah Courts; particularly, in cases involving the fundamental rights of the subjects. In *Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No 3)* [2001] 2 CLJ 709; [2001] 2 MLJ 689 it has been said (at p. 697):

> Judges are the protectors of fundamental liberties of the subjects as enshrined in the Constitution. It is a sacred trust that they must vigilantly uphold.

[35] The same sentiment was repeated by the High Court in *Abd Malek Hussin v. Borhan Hj Daud & Ors* [2008] 1 CLJ 264. Perhaps the following *dicta* could serve as a useful guide to High Court judges. In *Dato' Kadar Shah Tun Sulaiman v. Datin Fauziah Haron* [2008] 4 CLJ 504 the High Court said:

> [15] In my judgment, where there is an issue of competing jurisdiction between the civil court and the Syariah Court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Syariah Courts as the High Court of Malaya and High Court of Sabah and Sarawak are superior civil courts, being High Courts duly constituted under the Federal Constitution. Syariah Courts are mere State Courts established by State law, and under the Federal Constitution these State Courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964.

A **[36]** In *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481 the Court of Appeal said (at p. 497):

> Accordingly, in the light of the authorities we have referred to earlier in this judgment, we have come to the conclusion that the expression 'jurisdiction of the Syariah courts' [in Article 121(1A)] refers to 'the exclusive jurisdiction' of those courts. In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code and the Act, then the Courts referred to in art. 121(1) will have jurisdiction to try such an offence.

[37] We, therefore, allowed the appeal with costs. The order of the High Court is set aside.

[38] This matter is to proceed to trial before the High Court (after the necessary case management); and it would be appropriate if an application is made by any of the parties (but preferably the plaintiff) for the originating summons action to be converted to a writ action.

[39] (Note: The panel's decision was on 12 January 2012 and our decision was unanimous. However, by the time this draft judgment was ready on 30 July 2012, a member of the panel, Sulaiman Daud JCA, had retired as a judge of the Court of Appeal.)